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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,)	CASE NO. 3:21-cr-269-WHO
)	
Plaintiff,)	UNITED STATES' APPLICATION FOR ORDER
)	RE: WAIVER OF DEFENDANT'S ATTORNEY-
v.)	CLIENT PRIVILEGE AND DISCOVERY
)	
LEBNITZ TRAN, A/K/A VIET TRAN,)	
)	
Defendant.)	

The United States hereby moves the Court for an order (1) confirming waiver of defendant Lebnitz Tran's attorney-client privilege as to prior counsel Guyton Jinkerson; and (2) directing Jinkerson and his successors George Benetatos and Alex Park to produce discovery relevant to Jinkerson's representation of Tran. The undersigned discussed this Application with current defense counsel George Benetatos, who acknowledged Tran waived the attorney-client privilege as to Jinkerson by filing the habeas motion. Tran's motion under 28 U.S.C. § 2255 and supporting memorandum leave no doubt that he has waived the attorney-client privilege as to Jinkerson. *See* Dkt. 62, 62-1.

BACKGROUND

From April 2020 through July 2020, Tran orchestrated a scheme to defraud the Paycheck Protection Program ("PPP") and Economic Injury Disaster Loan ("EIDL") program of millions of

dollars. Dkt. No. 32 at 5:6-11, 25-27. In his plea agreement, Tran admitted to taking numerous steps to execute his scheme. He admitted to identifying pre-existing business entities and creating additional business entities for the purpose of submitting false and fraudulent applications for PPP and EIDL loans. *Id.* at 5:12-14. He admitted to making false and fraudulent statements to the Small Business Administration (“SBA”) and lender in connection with these loan applications, including false and fraudulent representations regarding the dates of operation of the loan applicant (e.g., falsely asserting that the loan applicant had been in business longer than it actually had); falsely overstating the number of persons employed by the loan applicant; and falsely overstating the loan applicant’s monthly payroll expenses. *Id.* at 5:15-20. He admitted that he electronically submitted false and fictitious documents to the SBA and lenders in support of the fraudulent PPP and EIDL loan applications, including false and fictitious tax documents. *Id.* at 5:21-23.

Tran admitted that he “submitted and caused to be submitted at least 27 PPP loan applications and at least seven EIDL loan applications, submitted in [his] name as well as in the name of others.” *Id.* at 5:24-25. In total, he “sought approximately \$8.5 million in PPP and EIDL loan proceeds through these applications and received over \$3.6 million from the SBA and SBA-approved lenders.” *Id.* at 5:25-27. Tran admitted that he “netted at least \$1,719,233 from this scheme.” *Id.* at 5:27.

At his change of plea hearing, Tran reaffirmed that these facts were true. Tran also agreed to pay restitution of at least \$1,719,233. *Id.* at 10:12-13. Guyton Jinkerson represented Tran at the change of plea hearing and sentencing. Dkt. Nos. 31, 46. During the Probation Office’s presentence investigation, Tran relied on the factual basis of the plea agreement. Dkt. No. 39 at ¶ 22.

ARGUMENT

A. Tran waived attorney-client privilege by alleging ineffective assistance

In his § 2255 motion, Tran waived his attorney-client privilege for all communications with his former counsel Guyton Jinkerson, who he claims rendered ineffective assistance in connection with his plea and sentencing. The Court should issue an order so finding. A proposed order is attached.

By claiming ineffective assistance, a defendant waives attorney-client privilege as to all communications with his lawyer regarding the representation he claims was deficient. *See Hernandez v. Tanninen*, 604 F.3d 1095, 1100 (9th Cir. 2010) (“Disclosing a privileged communication or raising a

claim that requires disclosure of a protected communication results in waiver as to all other communications on the same subject.”); *Bittaker v. Woodford*, 331 F.3d 715, 716 (9th Cir. 2003) (“It has long been the rule in the federal courts that, where a habeas petitioner raises a claim of ineffective assistance of counsel, he waives the attorney-client privilege as to all communications with his allegedly ineffective lawyer.”); *Wharton v. Calderon*, 127 F.3d 1201, 1203 (9th Cir. 1997) (same); *Tasby v. United States*, 504 F.2d 332, 336 (8th Cir. 1974) (same).

Tasby helpfully summarizes the rationale for this rule. “A client has a privilege to keep his conversations with his attorney confidential, but that privilege is waived when a client attacks his attorney’s competence in giving legal advice, puts in issue that advice and ascribes a course of action to his attorney that raises the specter of ineffectiveness or incompetence.” 504 F.2d at 336. The *Tasby* court emphasized that “[s]urely a client is not free to make various allegations of misconduct and incompetence while the attorney’s lips are sealed by invocation of the attorney-client privilege,” and that “[s]uch an incongruous result would be inconsistent with the object and purpose of the attorney-client privilege and a patent perversion of the rule.” *Id.*

“When a client calls into public question the competence of his attorney,” as Tran has done here, “the privilege is waived.” *Id.* In the memorandum in support of his § 2255 motion, Tran claims ineffective assistance, alleging that Jinkerson did not review with Tran documents including the indictment, plea agreement, Presentence Investigation Report, or sentencing memoranda. Dkt. No. 62-1 at 5:7-9, 14:16-15:24. Tran further claims that Jinkerson did not provide the United States with financial figures from Tran, refused to listen to Tran’s attempts to explain which loans Tran actually received, which proceeds he never received, and which proceeds were legitimately obtained. *Id.* at 5:2-5. Tran alleges that Jinkerson failed to review with him material information Tran provided him or informed him existed. *Id.* at 5:6-7. Tran claims Jinkerson did not discuss or otherwise review with him information Jinkerson received from the United States, including spreadsheets regarding the loans in question. *Id.* at 8:23-26. Tran alleges that Jinkerson did not discuss with Tran or investigate issues regarding Heather Russell, *id.* at 11:22-28, 16:4-21:28, Anthony Sanchez, *id.* at 22:1-25:8, or a Tesla purchased with loan proceeds, *id.* at 25:9-27:8.

The United States thus moves the Court to find that Tran has waived attorney-client privilege as

1 to Jinkerson.

2 **B. The Court should order Jinkerson and Jinkerson’s successors, to furnish all**
 3 **information and documents relating to Jinkerson’s representation in this matter**

4 To establish whether Jinkerson complied with standards of professional competence in his
 5 representation of Tran, this Court must analyze “whether ‘counsel’s representation fell below an
 6 objective standard of reasonableness considering *all the circumstances* under prevailing professional
 7 norms.’” *Harris v. Wood*, 64 F.3d 1432, 1435 (9th Cir. 1995) (quoting *Strickland v. Washington*, 466
 8 U.S. 668, 688 (1984)) (emphasis added). The scope of the waiver here is thus necessarily broad,
 9 encompassing all information and documents regarding Jinkerson’s representation of Tran in this matter.
 10 The United States therefore moves the Court to order that Jinkerson and Jinkerson’s successors furnish
 11 all information and documents regarding Jinkerson’s representation of Tran in this matter—including
 12 but not limited to notes, memoranda, letters, emails, other communications, billing records, and similar
 13 documents.

14 **CONCLUSION**

15 Because Lebnitz Tran has waived attorney-client privilege by alleging ineffective assistance of
 16 counsel, the United States requests that the Court order that (1) Tran’s attorney-client privilege with
 17 Guyton Jinkerson has been waived with respect to Jinkerson’s representation in this matter; and
 18 (2) Guyton Jinkerson and Jinkerson’s successors, shall furnish all information and documents regarding
 19 Jinkerson’s representation in this matter to the United States’ Attorney’s Office and the defendant within
 20 45 days of the date of the Court’s order. The United States further requests 90 days from the date of the
 21 Court’s order in which to file its response to Tran’s § 2255 motion on the merits.

22
 23 DATED: December 21, 2023

Respectfully submitted,

24 ISMAIL J. RAMSEY
 25 United States Attorney

26 /s/
 27 SARAH E. GRISWOLD
 28 Assistant United States Attorney

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Plaintiff,)	ORDER GRANTING UNITED STATES'
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Upon a showing of good cause, the Court finds that by his motion pursuant to 28 U.S.C. § 2255, in which he alleges ineffective assistance of counsel, defendant Lebnitz Tran has waived the attorney-client privilege for communications with his prior counsel Guyton Jinkerson regarding his representation of Tran in this matter.

IT IS HEREBY ORDERED that defendant Lebnitz Tran has waived the attorney-client privilege with respect to his communications with attorney Guyton Jinkerson regarding this matter.

IT IS FURTHER ORDERED that Guyton Jinkerson and Jinkerson's successors, shall furnish all information and documents regarding Jinkerson's representation of Lebnitz Tran in this matter, including but not limited to notes, memoranda, letters, emails, other communications, billing records,

1 and similar documents to the United States' Attorney's Office and the defendant within 45 days of the
2 date of this order.

3 IT IS FURTHER ORDERED that the United States has 90 days from the date of this order in
4 which to file its response to Lebnitz Tran's § 2255 motion on the merits.

5 IT IS SO ORDERED.

6
7 DATED: December 21, 2023


HON. WILLIAM H ORRICK
United States Senior District Judge